COMMONWEALTH OF KENTUCKY
SUPREME COURT

CASE NO: _____

DERRICK AMMONS, **DESMOND BELLOMY,** **ROBERT COLLIER,** **ROBERT DECKER,** **BRITTANY [sic, BRITTNEY] HOUCHIN-DECKER,** **STANLEY KEITH,** **JAMES KLEINHELTER,** **VIRGIL PRESTON,** **ROBERT WESLEY STEPHENS, AND** **BRANDON WRIGHT**	**PETITIONERS**
VS.	
HON. JANET C. BOOTH, 13TH JUDICIAL DISTRICT **HON. TIMOTHY R. COLEMAN, 38TH JUDICIAL CIRCUIT** **HON. STEVEN R. CREBESSA, 46TH JUDICIAL DISTRICT** **HON. HUNTER DAUGHERTY, 13TH JUDICIAL CIRCUIT** **HON. JOE W. HENDRICKS, JR., 7TH JUDICIAL CIRCUIT** **HON. JENNIFER PORTER, 55TH JUDICIAL DISTRICT** **HON. KIM RAZOR, 19TH JUDICIAL DISTRICT** **HON. KATHRYN G. SLONE, 28TH JUDICIAL DISTRICT**	**RESPONDENTS**
AND	
COMMONWEALTH OF KENTUCKY	**REAL PARTY IN INTEREST**

PETITION TO EXERCISE ORIGINAL JURISDICTION UNDER KENTUCKY CONSTITUTION § 110(2)(a)

Come the Petitioners, through undersigned counsel, and under Ky. Const. § 110(2)(a) and all other applicable law, petition this Court to exercise its original jurisdiction over matters within the Court of Justice by prohibiting the use of money bail as a means to secure the attendance of an indigent person, and prohibiting the detention of any individual

except after a hearing that comports with due process and upon a finding by clear and convincing evidence that the individual presents a danger to the community, and no condition or combination of conditions would reasonably ensure the safety of the public. As basis for this action, Petitioners state the following:

Introduction

Kentucky's system of pretrial release is badly broken. Almost all jurisdictions impose money bail even in cases involving minor offenses, and that money bail often effectively denies the defendant the presumption of innocence. What's worse, the application of this money bail practice varies wildly across Kentucky, such that the county which prosecutes the defendant may have a significant impact in whether the defendant remains incarcerated. What's worse, Kentucky has no meaningful speedy trial rule, so individuals can remain incarcerated pretrial until they have no more sentence to serve, effectively obliterating the presumption of innocence and their right to due process. Even among those whose cases get resolved while they still have a sentence remaining, the evidence is clear that those detained pretrial fare much worse than those who remain out of custody, meaning the quality of the justice you receive may literally depend on the county you are charged in.

In the end, this problem arises out of a lack of meaningful and enforceable standards in the rules governing pretrial release. In order to address this problem, this Court should use its authority under Ky. Const. § 110(2)(a) to enter an order directing the Court of Justice to refrain from using money bail in any case involving an indigent person, unless there is a finding by clear and convincing evidence that the individual presents a danger to the community.

Parties

I. Petitioners

This petition is brought on behalf of ten named persons. However, all of these are representative of other persons – hundreds of them – who are either as of this moment incarcerated pretrial while their case is pending, notwithstanding their presumption of innocence, or who were incarcerated for a period of time prior to being able to post a bail before. Others have already had their cases adjudicated, but were unable to make bail while they were presumed innocent, a deprivation of liberty which they will not get back, and for which the only remedy is a change in the rules which will prospectively govern the pretrial release of persons who are presumed innocent.

A. **Derrick Ammons** is charged in Meade Circuit Court with Criminal Mischief Second Degree for throwing a laundry detergent bottle onto a car causing damage (Meade District Court, 19-M-00365). His Affidavit and a portion of his court file are attached as Exhibit 1.

B. **Desmond Bellomy** is charged in Jessamine Circuit Court with Receiving Stolen Property > $10,000 for obtaining a Jeep Cherokee, Fleeing or Evading Police, Possession of a Controlled Substance (Cocaine), and Criminal Mischief. (Jessamine Circuit Court, 19-CR-00273). His most recent pretrial risk assessment report (which was produced after he was indicted in Jessamine Circuit Court), and a portion of his court file are attached as Exhibit 2.

C. **Robert Collier** was charged in Mason District Court, now bound over awaiting possible indictment in Mason Circuit Court, with Criminal Abuse of a Child, First

Degree (Mason District Court, 19-F-00257). His pretrial risk assessment report, and a portion of his court file, are attached as Exhibit 3.

D. **Robert Decker** is charged in Todd Circuit Court with First Degree Trafficking in a Controlled Substance, 1st Offense, under KRS 218A.1412, combined with a charge of First Degree Possession of a Controlled Substance under KSR 218A.1415, and for not having his rear license plate illuminated, having expired tags, failing to maintain vehicle insurance, and drug paraphernalia. (Todd Circuit Court, 18-CR-00012). His pretrial risk assessment report and a portion of his court file are attached as Exhibit 4.

E. **Brittney Houchin-Decker** is charged in Edmonson Circuit Court with Possession of Controlled Substance, Possession of Drug Paraphernalia, and two counts each of Wanton Endangerment and Endangerment of a Child for being in a home with drugs and children. (Edmonson Circuit Court, 19-CR-00118). Her Affidavit and a portion of her court file are attached as Exhibit 5.

F. **Stanley Keith** is charged in Bullitt District Court with Operating on a Suspended License and Leaving the Scene of an Accident. (Bullitt District Court, 19-T-05030). His pretrial risk assessment report and portion of his court file are attached as Exhibit 6.

G. **James Kleinhelter** was charged with Criminal Mischief Third Degree and Burglary Third Degree in Bullitt District Court. (Bullitt District Court, 19-F-00884). His pretrial risk assessment report and a portion of his court file are attached as Exhibit 7.

H. **Virgil Preston** is charged in Jessamine District Court with Wanton Endangerment First Degree (amended to Second Degree). (Jessamine District Court, 18-F-00419). His attorney's Affidavit, filed with permission of Mr. Preston, and a portion of Mr. Preston's court file are attached as Exhibit 8. The Affidavit has been redacted to remove the names of individuals other Mr. Preston who were involved in the case.

I. **Robert Wesley Stephens** is charged with Trafficking in a Controlled Substance, First Degree, First Offense in Pulaski District Court and has been bound over to Pulaski Circuit Court. (Pulaski District Court, 19-F-00610). His pretrial risk assessment report and a portion of his court file are attached as Exhibit 9.

J. **Brandon Wright** is charged with Flagrant Non-Support in Bullitt District Court and has been bound over to Bullitt Circuit Court. (Bullitt District Court, 19-F-00921). His pretrial risk assessment report and a portion of his court file are attached as Exhibit 10.

II. Respondents

The following are the nominal Respondents to this Petition, and are the currently sitting judges in the Courts in which the cases of the above-named Petitioners were or are pending.

A. **Hon. Jennifer Booth**, 13th Judicial District, Jessamine District Court

B. **Hon. Timothy R. Coleman**, 38th Judicial Circuit, Edmonson Circuit Court

C. **Hon. Steven R. Crebessa**, 46th Judicial District, Meade District Court

D. **Hon. Hunter Daugherty**, 13th Judicial Circuit, Jessamine Circuit Court

E. **Hon. Joe W. Hendricks**, Jr., 7th Judicial Circuit, Todd Circuit Court (Retired)

F. **Hon. Jennifer Porter**, 55th Judicial District, Bullitt District Court

G. **Hon. Kim Razor**, 19th Judicial District, Mason District Court

H. **Hon. Kathryn G. Slone**, 28th Judicial District, Pulaski District Court

III. Real Party in Interest, Commonwealth of Kentucky

The Commonwealth of Kentucky is the entity charged with initiating prosecutions. In each of the cases herein, the Commonwealth sought or supported the pretrial release decision made by the lower court. In this action the chief prosecutor under KRS 15.700, the Kentucky Attorney General, Daniel Cameron, is being served as the representative of the Commonwealth.

The Office of the Attorney General is served as both the designated appellate counsel for the Commonwealth in cases which come before this Court under KRS 15.020, and as required by CR 24.03, when the Constitutionality of an Act of the General Assembly is challenged.

Facts

The facts involving each of the named plaintiffs are as follows:

1. **Derrick Ammons** was arrested on November 15, 2019 and was given a $500 cash bond which he could not post. (Meade District Court, 19-M-00365). The Meade County Attorney's Office moved for an examination of competency, but his attorney objected on the grounds that, although the client was eccentric, he seemed competent and that Kentucky Correctional Psychiatric Center (KCPC) and Central State Hospital were "backed up," and Mr. Ammons would remain in custody for months in the event he could not get into one of them for evaluation. His attorney had a DPA Alternative Sentencing Worker look for treatment locally as an alternative, but at the next court date, the Meade

County Attorney again requested an evaluation and stated that the state would not accept outpatient treatment. By the end of the day, Mr. Ammons was accepted at "The Brook" for inpatient treatment and was allowed to be furloughed to treatment there, but was required to return to custody after completion of treatment. Mr. Ammons claims to have "lost everything," including his housing and his disability payments, all because he could not post bond and be released. Ultimately, Mr. Ammons accepted an offer for twelve months of conditionally discharged time, and agreed to not reside in Meade County. He was released the day he pled guilty. According to Mr. Ammons, he signed the plea order "mainly because he did not want to be in jail any longer." (See Affidavit of Mr. Ammons in Exhibit 1).

Mr. Ammons situation is but one example of someone who is supposedly too dangerous to release prior to adjudication (when he is still presumed innocent), but can be released on non-monetary conditions the moment he admits guilt.

2. **Desmond Bellomy** was arrested on September 1, 2019 on charges of Receiving Stolen Property > $10,000 for obtaining a Jeep Cherokee, Fleeing or Evading Police, Possession of a Controlled Substance (cocaine), and Criminal Mischief. He was also erroneously charged with being a felon in possession of a handgun, later dismissed as Mr. Bellomy has no prior felony conviction. Pretrial Services assessed Mr. Bellomy as a moderate risk of failure to appear in court and a moderate risk of committing new criminal activity. His bond was set at $10,000 cash, although his Pretrial Services report recommended that he be released on his own recognizance.

Desmond Bellomy is incarcerated in Jessamine County Detention Center pending trial. He is 20 years old, unemployed, and could not possibly afford to post a $10,000 bond.

Currently he has no suitable plea offer, and when he receives one he will likely be under great pressure to plea to a felony conviction in order to be released. Mr. Bellomy's jury trial in Jessamine Circuit Court is currently scheduled for February 24, 2020. Unless he makes bail beforehand, on that date, Mr. Bellomy will have already been incarcerated for almost six months.

3. **Robert Collier** was bound over from Mason District Court on charges of Criminal Abuse of a Child, First Degree on a $50,000 cash bond for allegedly allowing his children to remain in unsanitary conditions without the ability to leave such conditions and without proper nourishment or supervision. He was arrested on November 27, 2019, and assessed as a moderate (2) risk of failing to appear, and a low (1) risk of committing new criminal activity. The recommendation of pretrial was to release him on own recognizance or on an unsecured bond. Following his preliminary hearing and a request by his public defender for a modification of bail, the District Court December 4, 2019 wrote in the court's calendar that bond "will remain the same over objection of DPA." Fifty-thousand dollars bail for Mr. Collier, who has been found "needy" under KRS Chapter 31, is oppressive, and can only be viewed as a bail set to detain. Clearly, however, a wealthy person or someone with liquid assets could post this bail. Mr. Collier's indigency prevents him from doing so.

4. **Robert Decker** was charged with various crimes in Todd County, the most serious of which were First Degree, Trafficking in a Controlled Substance, First Offense, and Possession of a Controlled Substance. (Todd Circuit Court, 18-CR-00012). He was classified as a low (1) risk to fail to appear and a low (3) risk to commit new criminal

activity. His bail was initially set at $75,000, and eventually lowered to $50,000 cash only. He ultimately pled to his offenses and is still incarcerated, awaiting his chances at parole.

Meanwhile, within a year of his indictment, more or less, there were others in other parts of the state charged with offenses, of which the primary charges were the same as Mr. Decker's: First Degree Trafficking in a Controlled Substance, 1st Offense, and First Degree Possession of a Controlled Substance. (These persons are not parties to this Petition, and their bonds are displayed below solely as a comparison to Mr. Decker's, who's case is listed last below, to show a small example of the varied nature of bails set for persons similarly charged.)

Court	Case No.	Style	Bond
Ballard District	18-F-00001	*Comm. v. Holt*	$15,000 unsecured
McCracken Circuit	18-F-00063	*Comm. v. Gainey*	$2,500 cash only
Madison District	17-F-00648	*Comm. v. Perrin*	$15,000 cash only
Ohio Circuit	18-CR-00009	*Comm. v. Hardin*	Own recognizance
Nelson District	18-F-00035	*Comm. v. Fife*	$5,000 surety
Todd Circuit	18-CR-00012	*Comm. v. Decker*	$50,000 cash only

There are no standards or guidelines to explain the wide variance in these amounts, or to suggest that any of these amounts represent the least restrictive alternative to incarceration pretrial. A person charged in Ohio County is better off than the person charged in Todd County for no other reason than the judges in those counties prefer different bonds. Meanwhile, a person with wealth can make all of these bonds while a poor person may be able to make nothing more than the own-recognizance bond. These bails simply are not based upon "standards relevant to the purpose of assuring the presence of that defendant" required by *Stack*, which was recognized as binding upon Kentucky in *Abraham v. Commonwealth*, 565 S.W.2d 152 (Ky. App. 1977).

Mr. Decker's situation is but one example of someone who has a high bail, which by the amount set is manifestly excessive for someone who is appointed a public defender, and which varies greatly with other bails set for similarly situated persons charged in other counties.

5. **Brittney Houchin-Decker** was arrested on August 28, 2019 on charges of Possession of Controlled Substance, Wanton Endangerment, and Endangerment of a Child for being in a home with drugs and children (Edmonson District Court, 19-F-00065, Edmonson Circuit Court, 19-CR-00118). Three other co-defendants were also charged. Ms. Houchin-Decker was given bail credit and released on September 10, 2019. However, on September 30, 2019 she was indicted upon these charges, as well as an additional count of Endangering the Welfare of a Minor, two counts of Wanton Endangerment 1st degree, and 2 counts of Criminal Abuse 2nd degree. Notwithstanding the fact that she was out of jail and lawfully abiding by the terms of her bail, upon indictment the circuit judge issued a warrant with a $25,000 cash bond. In this jurisdiction, it is a regular practice that indictments are given cash bonds even if the defendant is already out on a district court bond and complying with the terms of the bond. Ms. Houchin-Decker was arraigned on October 21, 2019, but her bond remained the same until November 18, 2019, when she was granted a surety bond. However, she could not arrange for her bond to be posted until December 17, 2019. Throughout this time, all her co-defendants remained out of custody. She is 25 years old with a previous felony diversion but no felony convictions. Her next court date is not until January 27, 2020.

For Ms. Houchin-Decker, her time in jail between September 10, 2019 and December 17, 2019 was owing only to the fact that she could not make bail. Had she been

a person with means, she could have posted $25,000 cash; but, being a "needy" person as that term is used in KRS Chapter 31, the $25,000 represented an amount intended to detain.

6. **Stanley Keith** is charged with operating on a suspended license and leaving the scene of an accident in Bullitt District Court, 19-T-05030. He was arrested on December 12, 2019, was classified as a moderate risk in both categories of failure-to-appear and new criminal activity, having missed only one court date ever, and none in the past two years. He is a Shepherdsville resident who has obligations of family support. The trial judge set an initial bond of $1,000. On December 21, nine days later, the Court amended the bond to a $1,000 surety bond, and set a court date of January 28, 2020. The surety bond was posted on December 21, 2019, nine days after initial arrest and incarceration pretrial. The nine days which Mr. Keith served has amounted to only one of two things: If it is determined that he is not guilty, then it amounted to nine days of freedom needlessly lost which cannot be given back. If it is determined by plea or trial that he is guilty, then it represented a prepayment on a finding of eventual guilt, which flies in the face of a presumption of innocence. The nine days represent an arbitrary amount of time incarcerated, as if he had been able to secure a surety earlier, it would have been less, if later, it would have been more.

7. **James Kleinhelter** was charged on December 2, 2019 with criminal mischief and burglary in Bullitt District Court. He is alleged to have stolen four trash bags full of food from a food trailer at Kart Country, a go-kart-themed amusement park in Shepherdsville. He is also alleged to have stolen one of the park's go-karts and two batteries. Pretrial Services assessed Mr. Kleinhelter as having a low risk of failure to appear

in court and a low risk of committing new criminal activity, and recommended that he be released on his own recognizance.

Mr. Kleinhelter's bond was initially set at $20,000 cash, the court recording that he was a flight risk (it should also be noted that he does not own a motor vehicle). His bond was amended on December 3, 2019 to $10,000 cash, now due to him being a danger to others, and then again on December 12, 2020 to $5,000 cash or $10,000 in property. A motion to amend his bond to a $2,500 surety bond was denied on January 6. On January 15, 2020 Mr. Kleinhelter was granted work release, but is still incarcerated awaiting indictment. By all objective measures, Mr. Kleinhelter is likely to appear in court when ordered and unlikely to present a danger to others. He is unemployed, lives with his parents and has never failed to appear for a court summons. He was convicted of menacing and resisting arrest in 2013, but otherwise has no violent criminal history. He is indigent, and could not possibly afford to post a $5,000 cash bond let alone $20,000.

8. **Virgil Preston**, charged with Wanton Endangerment First Degree (amended to Wanton Endangerment Second Degree) in Jessamine District Court case number 18-F-00419, had a bail set of $5,000 full cash when he was arrested on November 12, 2018. The story in his citation, as told by his teenage son to his school resource officer, was that Mr. Preston had gotten into an argument with his wife, who had tried to get out of the argument by leaving the area in a car with her son, and son's girlfriend. Allegedly, the three of them were driving away when Mr. Preston began to follow them in his truck. When his wife stopped at a stop sign, Mr. Preston allegedly pushed his truck into the back of their car, forcing them into the middle of the intersection. Thereupon, his wife allegedly drove to a

police station parking lot, but told the passengers that they were not allowed to report what had happened.

As bad as this sounds, Mr. Preston had a viable, provable defense: None of this actually happened. As Mr. Preston explained to the District Court on the day his preliminary hearing was supposed to occur (but which did not, in exchange for an amendment of the charge from First Degree to Second Degree), his son made up the whole story in order to get himself out from trouble. Mr. Preston gave the Commonwealth photographic proof of two unsullied vehicle bumpers, as well as affidavits from all of the victims which all recanted their statements, and essentially said that the allegations came from his teenage son, who was upset that Mr. Preston was going to keep him from seeing his girlfriend. The prosecution refused to agree to amend bond or drop the case in spite of the evidence, saying, "if you knew [these people] like the County did, you would know that recanting their statements is just the kind of thing they do." On December 4, 2018, Mr. Preston pled to probated charges in order to get out of jail that day. Mr. Preston's attorney went on record advising him not to plea; but Mr. Preston pled guilty to the charge because it offered probation and he did not want to wait for a hearing on bond.

Whether Mr. Preston was *actually* innocent or not is only a minor point. He was certainly *presumed* innocent, and presented his attorney with a viable defense. Yet, his defense was dropped so that he could get out of jail, after serving 26 days in jail, unable to make a bail.

9. **Robert Wesley Stephens** is charged with Trafficking in a Controlled Substance, First Degree, First Offense, along with Trafficking in a Legend Drug, First Offense and Tampering with Physical Evidence, in Pulaski Circuit Court. He has been

assessed as a moderate (2) risk to fail to appear and a moderate risk (8) to commit new criminal activity. His bail is set at $10,000 cash. Mr. Stephens' problem is that he has eighteen years on the shelf, owing to a plea bargain which he took in December 2019 for eighteen years probated for five years arising out of several cases (19-CR-00309-2; 19-CR3-0071-1; 19-CR-00251-1; 19-CR-00368-1). Two of those charges were for theft of scrap wire, which the Commonwealth would have had difficulty proving were worth over $500 (the minimum threshold for a felony offense), while one was for possession of a controlled substance to which another person had pled and had claimed ownership of the substance. However, he had been unable to make bail, and abandoned any defenses in order not to have to wait five more additional months for trial.

Now, he also has a defense to the trafficking charges. He was arrested at another person's house, who had put him up for the winter, given that Mr. Stephens is homeless. When the police had a drug bust at the house, he was caught up in it. But the owner of the drugs has yet to be determined or proven. Again, he cannot make bail, and while it is too soon to know if he will get a plea offer he can accept, he remains in jail on a bond that a person with means could make.

10. **Brandon Wright** is charged with flagrant non-support in Bullitt Circuit Court and has a $10,000 cash bond. Coincidentally, his alleged arrearages are $10,384.52. He was arrested and given a $10,000 bail on December 23, 2019, which was reaffirmed on January 6, 2020 and has remained in jail since arrest in December. Like many persons charged with flagrant non-support, his bail being set roughly at the same amount as the alleged arrearages in an arbitrary presumption of guilt: That is, post the cash bail, and now there is something with which to pay the arrearages, after one is found guilty.

This Court Should Exercise Its Control over the Court of Justice

Section 110(2)(a) of the Kentucky Constitution provides that the Supreme Court of Kentucky has appellate jurisdiction only, except that is "shall have the power to issue all writs necessary… as may be required to exercise control over the Court of Justice." This Court has previously used its original jurisdiction over matters pertaining to the Court of Justice to establish Administrative Release and made it mandatory statewide. *See* Supreme Court Order 17-01 and amendments (attached as Exhibit 11). This Court has more recently exercised its original jurisdiction in Supreme Court Order 17-01, "Judicial Guidelines for Pretrial Release and Monitored Conditional Release. (See Supreme Court Order 17-20, attached as Exhibit 12). There are several reasons why this Court should do something similar in this case, by exercising its authority and issuing a writ regarding how pretrial release decisions are handled in criminal cases.

First, this Court has not comprehensively addressed these issues since *Long v. Hamilton*, 467 S.W.2d 139 (Ky. 1971). Since that time, much has changed. In 1987, the United States Supreme Court addressed bail and detention, and found that the Fifth Amendment's due process clause required that Government could not impose preventative detention absent a finding by clear and convincing evidence that the individual was a danger to himself or others if released. *United States v. Salerno*, 481 U.S. 739 (1987). Subsequently, several jurisdictions have found that setting a bond amount that is well beyond the defendant's financial capacity is tantamount to a total denial of bond, which would require a finding of dangerousness by clear and convincing evidence. *See, e.g., State ex rel. Torrez v. Whitaker*, 410 P.3d 201, 219 (N.M. 2018); *Byrd v. Mascara*, 197 So.

3d 1211, 1213 (Fla. Dist. Ct. App. 2016); *Ex parte Nimnicht*, 467 S.W.3d 64, 70 (Tex. App. 2015); *Costa v. Mackey*, 227 Ariz. 565, 569, 261 P.3d 449, 453 (Ct. App. 2011). Other jurisdictions have reached the same result by finding that consideration of the defendant's ability to meet the proposed bail is required by due process, and/or equal protection. *See, e.g., Brangan v. Commonwealth*, 477 Mass. 691, 707, 80 N.E.3d 949, 965 (2017)(consideration required by due process); *ODonnell v. Harris County, Texas*, 251 F.Supp.3d 1052 (S.D. Texas – Houston, 2017)(consideration required by due process and equal protection).

During this time, many jurisdictions – including Kentucky – have made significant reforms to their pretrial release statutes. *See, e.g.,*, N.Y.S.B. 1509 (eff. 1/1/20)(abolishing cash bail for misdemeanor offenses, making other changes); N.J. Stat. Ann. §§ 2A:162-15 to -26; N.J. Rule 3:4A (eff. 1/1/17)(reducing use of cash bail); New Mexico Rule 5-409 (eff. 7/1/17)(reducing reliance on financial conditions of release); In Kentucky, 2011 House Bill 463 created KRS 431.066, and made other modifications to KRS 431.525.

Supreme Court Order 17-20, which does address KRS 431.066(2) and KRS 431.525, does not address the applicability to the states of the *Salerno* due process requirement, in case of pretrial detention, that the court find by clear and convincing evidence that the defendant poses such a risk to the public that he or she cannot be released under any condition or combination of conditions. Further, it does not address equal protection concerns of money bail which has the effect of detaining only the indigent, and not persons of means and wealth. The order does not address the issue of whether "excessive bail" is still defined as this court held in *Adkins v. Regan*, 233 S.W.2d 402 (Ky.

1950), "if the amount required is so excessive as to be prohibitory, the result is a denial of bail." Finally, SCO 17-20, Section 11, expressly states:

> The adoption of these guidelines does not, either expressly or impliedly, reflect on the ultimate constitutionality of the statutes involved.

This Petition expressly asks the Court to specifically consider and decide the ultimate constitutionality of the statutes involved, including the due process and equal protection issues arising under the Fifth and Fourteenth Amendments of the United States Constitution, and Sections 16 and 17 of the Kentucky Constitution, and to issue either an Order directed to all courts in the Court of Justice, or a published opinion on the merits of the issues contained within this petition.

Second, while the legislative and constitutional changes to pretrial release have been significant, none of these provisions have been definitively interpreted or implemented in any published opinion by this Court or Kentucky Court of Appeals. The reason for this is not for lack of effort on behalf of anybody. Rather, it has proven to be extremely difficult to get a proper case and controversy before this Court, given the current structure of bail appeals. Circuit Courts have exclusive jurisdiction over felony cases for which an indictment has been returned. Appeals of circuit bonds on felony cases are to the Court of Appeals through the expedited procedures set forth in RCr 4.43. Because it is an "expedited" appeal, the appeal is heard by a "motion panel," which issues orders, not opinions. Generally, these orders are unpublished[1], and therefore of no precedential value

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[1] *See, e.g., Williams v. Commonwealth*, 2019-CA-001767;*Terhune v. Commonwealth*, 2018-CA-001358; *Richardson v. Commonwealth*, 2017-CA-000299; *Oney v. Commonwealth*, 2015-CA-000748; *Conrad v. Commonwealth*, 2015-CA-001178; *Redmon v. Commonwealth*, 2011-CA-001428; *Haney v. Commonwealth*, 2011-CA-001427; *Keen v. Commonwealth*, 2011-CA-001323; *Medina-Santiago v. Commonwealth*,

in other cases. In fact, the only published order on a bail appeal, *Napier v. Commonwealth*, 372 S.W.3d 431 (Ky. App. – 2012), did not address the merits of the appeal, holding instead that any bail issues were mooted by the entry of Mr. Napier into a diversion agreement. Often, copies of these orders are not even available online. In turn, because these are unpublished orders, it is not easy to get this Court to take up discretionary review[2]. The result is that there remains no good bail precedents by this Court, and no good way to get a case before this Court.

MEMORANDUM OF AUTHORITIES

I. BAIL IN THIS STATE IS CONTINUALLY BEING SET FOR PURPOSES OF DETENTION, IN VIOLATION OF THE PROHIBITION AGAINST EXCESSIVE BAIL IN BOTH THE UNITED STATES AND KENTUCKY CONSTITUTIONS.

The Eighth Amendment to the Constitution of the United States and Kentucky Constitution §17 both mandate "[e]xcessive bail shall not be required ..." Kentucky Constitution §16 goes further and mandates that "[a]ll prisoners shall be bailable by sufficient securities, unless for capital offenses..." The United States Supreme Court has expressly announced the function of setting bonds, which it has noted is "limited" and

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2011-CA-001420, all of which addressed the merits of the bail appeal, but none of which were ordered published. They are collectively attached as Exhibit 13.

[2] This Court has denied discretionary review in at least six cases. Four of them were filed after the Court had addressed the bail issues on the merits: *Terhune v. Commonwealth*, 2018-SC-000589; *Richardson v. Commonwealth*, 2017-SC-000338; *Oney v. Commonwealth*, 2015-SC-000464; and *Conrad v. Commonwealth,* 2015-SC-000708 Two of them were filed after the bail appeal had been dismissed by the Court of Appeals due to mootness: *Napier v. Commonwealth*, 2012-SC-000230 and *Medina-Santiago v. Commonwealth*, 2011-SC-000776. These orders are attached collectively as Exhibit 14.

"must be based upon standards relevant to the purpose of assuring the presence of that defendant." *Stack v. Boyle*, 342 U.S. 1, 5 (1951). "Bail set at a figure higher than an amount reasonably calculated [to ensure the defendant's presence at trial] is 'excessive' under the Eighth Amendment." *Id.* This court adopted an identical view in *Long v. Hamilton*, 467 S.W.2d 139, 141, 142 (Ky. 1971), holding:

> The allowance of bail pending trial honors the presumption of innocence and allows a defendant freedom to assist in the preparation of his defense. The objective of bail is to allow this freedom pending trial and yet guarantee that the defendant will be available for any proceeding necessary to the disposition of the charge... Any attempt to impose excessive bail as a means to deny freedom pending trial of charges amounts to a punishment of the prisoner for charges upon which he has not been convicted and of which he may be entirely innocent.

In Kentucky, "[r]easonableness in the amount of bail should be the governing principle. The determination of that question must take into consideration the nature of the offense with some regard to the prisoner's pecuniary circumstances. If the amount required is so excessive as to be prohibitory, the result is a denial of bail." *Adkins v. Regan*, 233 S.W.2d 402 (Ky. 1950).

Yet, in this state, bail is routinely set at high amounts, often with the condition of "cash only" so that even a property bond cannot be used to secure a defendant's release. An illustration of this fact is found in the Kentucky Judicial Conduct Commission's Agreed Order of Suspension of a District Court Judge in the 34th Judicial District. (A copy of the Agreed Order is attached as Exhibit 15). According to the facts of that opinion, the trial judge set a $25,000 bond on a defendant's case. When the judge became aware that the defendant's mother had arrived at the Circuit Clerk's office to pay the bond, the judge ordered the bail to be raised from $25,000 to $50,000. The Judicial Conduct Commission suspended the judge, in part, for taking this action without notice and hearing on the bond

increase. Not discussed in the Agreed Order, however, was the fact that there can be no explanation for doubling the bond – at the moment that the defendant was about to post it – other than using the amount of bail to detain in violation of *Adkins* and *Long, supra.* Clearly, the court assumed that $25,000 would ensure that the defendant remained in jail, and upon learning that this assumption was faulty, tried to curb release through doubling the amount. Courts are using bail to ensure that defendants are present at trial by guaranteeing that they cannot be released from jail in the interim.

II. THE AMOUNT OF BAIL SET BY THE COURTS VARIES WIDELY AMONG THE COUNTIES, AND WHETHER OR NOT YOU CAN SECURE RELEASE UPON A GIVEN CHARGE CAN DEPEND UPON THE COUNTY IN WHICH YOU WERE CHARGED, IN VIOLATION OF SECTION 2 OF THE KENTUCKY CONSTITUTION.

The September 2012 Justice Policy Institute publication "Bail Fail: Why the U.S. Should End the Practice of Using Money for Bail" (attached as Exhibit 16) states that "[e]ven within a state, the amount of bail set for a charge may vary by county." *Id.* at 22. This is especially true within Kentucky. The wide variance in bails throughout this state have been documented and commented upon. The Kentucky Center for Economic Policy, examining data provided by the Kentucky Administrative Office of the Courts, found the following:

> [N]ew data shows widely varying rates between counties in the use of cash bail and in the ability of those arrested to meet those monetary conditions. The share of cases granted release pretrial without monetary conditions ranges from just 5% in McCracken County to 68% in Martin County. And just 17% of cases subject to monetary bail in Wolfe County result in the defendant finding a way to make the payment while 99% do in Hopkins County.
>
> The data suggests an arbitrary system of justice based on location. In certain counties, people with low incomes face much higher risk of harms from being detained in jail ranging from job loss to higher likelihoods of being found guilty and committing crimes in the future. In addition, counties that

> detain more people on monetary conditions face additional jail costs many of them cannot afford. ("Disparate Justice: Where Kentuckians Live Determines Whether They Stay in Jail Because They Can't Afford Cash Bail," Spalding, A., Kentucky Center for Economic Policy, June 11, 2019, attached as Exhibit 17, referencing "Release Decisions and Outcomes Cases Booked CY 2014-2018 Statewide," Sturtevant, D., and Manley, T., Kentucky Administrative Office of the Courts, February 21, 2019, attached as Exhibit 18.)

The article then uses the data to show just how varied the practice of setting bail is jurisdiction to jurisdiction. Figure 12 on page 4 of the Article illustrates how, for the state as a whole, bond amounts do not correlate with risk levels of defendants (i.e., low risk versus high risk). Rather, bail amounts seem to just be arbitrarily set.

Section 2 of Kentucky's Constitution provides that "[a]bsolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority." Yet, the setting of bail seems to be one of the most arbitrary acts within the criminal justice system.

The problem is, there are no standards! As the previously mentioned article "Bail Fail" argues, while money bail is widely believed to incentivize a person's return to court, the use of money bail at increasingly higher amounts over the years has not substantially changed rates of failure to appear. Moreover, "there is no definitive association between a particular accusation and the amount of money that would guarantee appearance at court (or deter future criminal activity) for that offense. Hence, the bail amounts are arbitrary and guarantee neither safety in the community nor appearance in court." *Id.* at 23. With no standards, guidelines, studies or empirical evidence to advise a court what is the lowest amount of bail that reasonably cause someone to come to court, the practice of setting cash bails does not survive even the rational basis test, much less a heightened scrutiny. As

shown in the "Facts" section of this Petition, bails for the same charges can vary widely among judges, among counties, among district and circuit courts. The only thing that a cash bail is doing is drawing a line between haves and have-nots, or jailed and jailed-nots.

Kentucky's present system of allowing the setting of bail without regard to risk level of the defendant, or without reference to some standard which shows a correlation between amount of money bail and a defendant's propensity to flee or not reoffend, is arbitrary, and the Supreme Court should exercise its original jurisdiction to control the Court of Justice under Section 110 of the Kentucky Constitution.

III. KENTUCKY'S BAIL SYSTEM IS UNCONSTITUTIONAL UNDER THE EQUAL PROTECTION AND DUE PROCESS CLAUSES OF THE UNITED STATES CONSTITUTION.

The Due Process and Equal Protection Clauses are respectively the last two clauses located at the end of Section 1 of the Fourteenth Amendment, and provide:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; ***nor shall any State deprive any person of life, liberty, or property, without due process of law***; ***nor deny to any person within its jurisdiction the equal protection of the laws***. [Emphasis added.]

A. Kentucky's Money Bail Scheme Violates the Equal Protection Clause.

Petitioners Desmond Bellomy, Robert Collier, James Kleinhelter, Robert Wesley Stephens and Brandon Wright are all currently incarcerated on cash bails they cannot make. Such bail violates the Equal Protection Clause because protection which would not be denied to a person of wealth is being denied to them by virtue of them being indigent. Of course, there are various degrees of scrutiny under the Equal Protection Clause, and in most

contexts, wealth-based distinctions are subject only to the rational basis review, because "[g]enerally speaking, an individual's indigence does not make that individual a member of a suspect class for equal protection purposes." *Driggers v. Cruz*, 740 F.3d 333, 337 (5th Cir. 2014)(*citing Maher v. Roe*, 432 U.S. 464 (1977).

However, federal case law makes clear that detention based on wealth is an exception to the general rule that rational basis review applies to wealth-based classifications. In *Williams v. Illinois*, 399 U.S. 235 (1970), the United States Supreme Court ruled that "[o]nce the State has defined the outer limits of incarceration necessary to satisfy its penological interests and policies, it may not then subject a certain class of convicted defendants to a period of imprisonment beyond the statutory maximum solely by reason of their indigency." *Id.* at 241-242. Although this case was concerned with incarceration of convicted persons, *Tate v. Short*, 401 U.S. 395 (1971) extended the holding of *Williams* to a case involving fines:

> [T]he same constitutional defect condemned in *Williams* also inheres in jailing an indigent for failing to make immediate payment of any fine, whether or not the fine is accompanied by a jail term and whether or not the jail term of the indigent extends beyond the maximum term that may be imposed on a person willing and able to pay a fine. In each case, the Constitution prohibits the State from imposing a fine as a sentence and then automatically converting it into a jail term solely because the defendant is indigent and cannot forthwith pay the fine in full. *Id.* at 671.

Although *Williams* and *Tate* are not pretrial release cases, they nevertheless stand as exceptions to the normal rule that wealth-based distinctions are subject to the rational basis test when it comes to detention of individuals. Any argument that they do not apply to pretrial release cases as well is not well-founded. As observed in the recent decision of

the United States District Court for the Southern District of Texas in *ODonnell v. Harris County, Texas*, 251 F. Supp. 3d 1052 (S.D. Tx. – Houston Div. – 2017):

> The defendants' argument *that Williams, Tate,* and *Bearden[v. Georgia,* 461 U.S. 660 (1993)] are limited to detention for failure to pay post-conviction fines is unpersuasive. Although state and local governments have compelling interests in punishing and deterring violations of court orders, including the failure to pay court-ordered fines, the Supreme Court limits post-conviction detention of indigent defendants who cannot pay fines. The Court held that detention may be imposed only as a last resort, after a court carefully reviews the alternatives and makes findings on the record that detention is the least restrictive option. *Bearden*, 461 U.S. at 671–72, 103 S.Ct. 2064. By contrast, pretrial bail is not intended to be punitive. *See, e.g., Brown v. State*, 338 P.3d at 1291 (N. Mex. 2014) ("Bail is not pretrial punishment and is not be set solely on the basis of an accusation of a serious crime."). The defendants have argued that the government's interest in setting bail is to ensure that misdemeanor arrestees return for court appearances, not to protect public safety or to deter crime. (See Docket Entry No. 101 at 7, 13). In the absence of a greater penological interest, and given the presumption of innocence for those awaiting trial, a government policy of wealth-based classifications for pretrial detention for misdemeanor offenses deserves, if anything, less deference than post-conviction detention.

Accordingly, the *ODonnell* Court found that "an absolute deprivation of liberty based on wealth creates a suspect classification deserving heightened scrutiny." *Id.* at 64. Heightened scrutiny in turn requires a court to evaluate the government's legitimate interest in a challenged policy or practice and then inquire whether there is a sufficient "fit" between the government's means and ends. *See id.* at 66. "At a maximum, classifications created by state action which disadvantage a suspect class or impinge upon the exercise of a fundamental right are subject to strict scrutiny, and will be upheld only when they are precisely tailored to serve a compelling state interest." *Id.*

On February 14, 2018, the Fifth Circuit issued its appellate decision in *ODonnell v. Harris County, Texas*, 882 F.3d 528 (5th Cir. – 2018). To DPA's knowledge, this is the

first time that a federal circuit court has granted relief to an arrestee who could not make bail in a money-bail system on grounds of equal protection due to the poverty of an individual:

> In sum, the essence of the district court's equal protection analysis can be boiled down to the following: take two misdemeanor arrestees who are identical in every way—same charge, same criminal backgrounds, same circumstances, etc.—except that one is wealthy and one is indigent. Applying the County's current custom and practice, with their lack of individualized assessment and mechanical application of the secured bail schedule, both arrestees would almost certainly receive identical secured bail amounts. One arrestee is able to post bond, and the other is not. As a result, the wealthy arrestee is less likely to plead guilty, more likely to receive a shorter sentence or be acquitted, and less likely to bear the social costs of incarceration. The poor arrestee, by contrast, must bear the brunt of all of these, simply because he has less money than his wealthy counterpart. The district court held that this state of affairs violates the equal protection clause, and we agree.

Applying this analysis to the bail at hand, it is apparent that the state's compelling interest of having people attend court is not being met by a bail system which allows release (or not) depending upon whether the defendant has wealth and means (or not). If the goal of the money bail is to ensure attendance at trial, then pursuant to *Stack v. Boyle*, 342 U.S. 1 (1951) "the fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant." *Id.* at 4-5. And, as stated previously, there are no standards.

B. Kentucky's Money Bail Scheme Violates Procedural Due Process Protected by the Fourteenth Amendment.

As already shown, the use of setting a money bail, cash only, for purposes of detention violates the Kentucky Constitution and *Adkins v. Regan* prohibition against bail set in a "prohibitory" amount. Yet, it can be argued that Kentucky judges have no option other than to set a high, unmakeable money bail in order to detain someone deemed too

dangerous to release. For example, if a serial rapist were finally caught, releasing the person may in those circumstances place to much risk on the community. If such a person is caught, how is the court to protect the public?

The answer lies in the interpretation of Section 16 of Kentucky's Constitution. That provision provides in pertinent part that "all prisoners are bailable by sufficient securities..." This amounts to a finding by the framers of our constitution that all persons, other than those charged with a capital offense where the proof is evident and the presumption great, are capable of being safely released under conditions that will assure their appearance at trial. Since that time, an opinion has evolved that there are some instances where the threat posed by the accused is so clear that preventative detention is warranted. Due to the lack of clear guidance, in Kentucky that preventative detention is presently accomplished through the setting of impossibly high bond amounts. However, the approach taken in these cases – essentially, a hearing with no standards or findings -- is not consistent with the requirements of due process.

In *United States v. Salerno*, 481 U.S. 739 (1987), the United States Supreme Court acknowledged that the Excessive Bail Clause of the Eighth Amendment of the United States Constitution provides "merely" that excessive bail shall not be required, but "says nothing about whether bail shall be available at all." *Id.* at 752. (There is, after all, no counterpart in the United States Constitution to Section 16 of the Kentucky Constitution.) Accordingly, the Court rejected the claim of the respondents that the Excessive Bail granted a right to bail calculated solely upon considerations of flight. Instead, the Court examined the right to due process under the Fifth Amendment Due Process Clause (which, of course, is binding upon the states through passage of the Fourteenth Amendment's Due

Process Clause), and concluded that "[w]hen the Government proves by clear and convincing evidence that an arrestee presents an identified and articulable threat to the community…a court may disable the arrestee from executing that threat."

If a judge were to determine that there are no sufficient securities to ensure the public safety, leaving Section 16 of the Kentucky Constitution inapplicable, then Kentucky would stand in the same shoes as the federal government: no general right to bail, but any detention must be done in a manner that comports with due process. *Salerno* is binding upon the states to the extent that *Salerno* requires strict scrutiny of pretrial detention conditions. (*See Lopez-Valenzuela v. Arpaio*, 770 F.3d 772 (9th Cir. 2014)(en banc)). The *Salerno* Court made clear under the Due Process Clause, "liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." *Salerno*. at 755. Nothing about the setting of cash-only bail, in the absence of rational standards which would advise trial judges what the least restrictive amount of cash is necessary to achieve either court appearances or community safety, is either careful or limited.

"The United States Supreme Court has adopted a two-step analysis to examine whether an individual's procedural due process rights have been violated. The first question 'asks whether there exists a liberty or property interest which has been interfered with by the State; the second examines whether the procedures attendant upon that deprivation were constitutionally sufficient.'" *Meza v. Livingston*, 607 F.3d. 392, 399 (5th Cir. 2010)(*quoting Ky. Dept. of Corr. v. Thompson,* 490 U.S. 454, 460 (1989). "State law creates protected liberty interests only when (1) the state places substantive limitations on official conduct by using explicitly mandatory language in connection with requiring specific substantive predicates, and (2) the state law requires a specific outcome if those

substantive predicates are met." *Fields v. Henry County, Tennessee*, 701 F.3d 180, 186 (6th Cir. 2012).

In the present case, KRS 431.066 and 431.525 do not place substantive limitations on the judges' ability to set bail for persons who are considered high risks, but who nevertheless have a constitutional right to bail. In the case of a person found to be a high risk, there is no upper limit in the amount of bail, nor is there any requirement that the court take the prisoner's pecuniary situation into account. One of the factors which the court is supposed to consider, whether the bail is "oppressive" (KRS 431.525(1)(b)), does not come with the *Adkins* admonition that the amount not be "prohibitory." Rather, bails are routinely set, presumably after a review of all of the KRS 431.525 factors, in amounts which prohibit the ability of the defendant to make bail. As held in *Abraham v. Commonwealth*, 565 S.W.2d 152 (Ky. App. 1977), a court may not consider just one of the KRS 431.525 factors, it must consider all of them. In that case, the trial court considered only the seriousness of the offense, and did not consider whether the amount of bail was "oppressive."

Furthermore, there are no evidentiary standards which control whether a person can be found to be a danger to the community. *Salerno, supra*, requires a finding of individualized dangerousness (not based merely on the nature of the offense charged) by "clear and convincing evidence," but this evidentiary standard is not required by the Kentucky statutes or case law at the time of initial fixing of bail. In fact, RCr 4.40 and 4.42 impose the "clear and convincing evidence" standard only upon cases where the defendant has been released and a party is seeking a change in bail conditions. If the person has not

been released, he can be detained via a high money bail on no more evidence than a finding of probable cause.[3]

Accordingly, Kentucky's statutory scheme fails under the procedural due process test. The Supreme Court should adopt rules or issue an opinion, binding upon the various district and circuit courts, which abolish money bail as a means to detain individuals, and which adopt a procedure like that in *Salerno, e.g.,* require a finding by clear and convincing evidence that someone is too dangerous to release into the community, and that no condition or combination of conditions imposed upon the defendant would reasonably protect the community.

IV. THE IMPROPER USE OF MONEY BAIL, COUPLED WITH THE ABSENCE OF CLEAR SPEEDY TRIAL GUIDELINES, ALSO VIOLATES THE PRESUMPTION OF INNOCENCE.

Even if the Court believes that Kentucky bail procedures do not violate procedural due process or the Equal Protection clause in the abstract, they surely do violate core

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[3]*See Bolton v. Irvin*, 373 S.W.3d 432 (Ky. 2012): "RCr 4.40(1) permits either the defendant or the Commonwealth to apply for a change in the conditions of pretrial release (including an increase or decrease in the amount of bail) at any time before trial and to request an adversary hearing on the motion. ***If the defendant has appeared when required at previous proceedings in the case, the Commonwealth must demonstrate by "clear and convincing evidence the need to modify existing conditions of release.***" RCr 4.40(3). As previously stated, RCr 3.14(1) specifically permits a district court to reconsider bail following a finding of probable cause. Therefore, there was no need for the court to utilize the more general procedures established by RCr 4.40.

RCr 4.42, which concerns enforcement and modification of conditions for a defendant who has already been released pending trial, also does not apply in this case. By its plain language, the rule applies "at any time following the release of the defendant and before the defendant is required to appear for trial...." ***The rule provides additional protections for the liberty interests of a defendant who has already been granted pretrial release. It is therefore inapplicable to a defendant like Irvin who remained incarcerated pending trial***. [Emphasis added.]

constitutional requirements when considered in conjunction with the lack of a firm speedy trial rule. The United States and many state jurisdictions have adopted speedy trial rules that provide that a case is to be dismissed with prejudice if not tried within a certain period. *See, e.g.*, Speedy Trial Act, 18 U.S.C. §§ 3161(c)(1) (trial must occur 70 days from first appearance); Cal. Penal Code § 1382(a)(2) (trial must occur within 60 days of arraignment); 725 Ill. Comp. Stat. Ann. 5/103-5(a) (trial must occur within 120 days of being taken into custody, or 160 days of arraignment if out of custody); *see generally* LaFave et al, 5 Crim. Proc. § 18.3(c) (4th ed.) (collecting statutes). While these provisions have exceptions, they ensure that the state has fully investigated its case prior to bringing charges, which greatly diminishes the risk of wrongful pretrial incarceration.

Contrast that to Kentucky, where outside of the context of the Interstate Agreement on Detainers, substantial delays for purposes of investigation are routinely tolerated. *See, e.g., Henderson v. Commonwealth*, 563 S.W.3d 651 (Ky. 2018)(fifty-six month delay between arrest and final sentencing not a violation of fast and speedy trial right);*Goncalves v. Commonwealth*, 404 S.W.3d 180, 202 (Ky. 2013)(two year delay not unconstitutional in robbery case); *Smith v. Commonwealth*, 361 S.W.3d 908, 913 (Ky. 2012)(two year and four month delay not unconstitutional in robbery case). The result is that there is no disincentive for the Commonwealth to bring charges at a time when their evidence is only sufficient to establish probable cause. Then, as a result of Kentucky's improper money bail practices, the defendant can remain in custody while the case is investigated, or until he or she loses the will to fight and simply pleads guilty. As a result, it is commonplace in the criminal cases that come before this Court that the defendant was arrested shortly after the crime and remained in custody while the lab tested evidence, while witnesses are

interviewed, etc. That should not occur in the absence of clear and convincing evidence that the defendant is a danger to his community.

As a result of these practices, hundreds of defendants plead guilty to time served on felony charges each year. According to the Kentucky Department of Corrections, in FY 2018, 270 individuals plead to time served on Class D offenses. The average amount of jail credit for those who pled guilty in FY 18 ranged from 1 day (Robertson County) or 44 days (Muhlenburg County), to 314 days (Clay County) or 316 days (Trimble County). Jefferson County – the state's largest by far – had an average of 261 days in custody at the time of sentencing. This is more than twice the typical speedy trial requirement in those states with specific requirements. (*See* Affidavit of Timothy Arnold, attached as Exhibit 19.)

"The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." *Coffin v. United States*, 156 U.S. 432, 453 (1895). Though subject to their own state and federal constitutional provisions, the prohibition on excessive bail and the right to a speedy trial both exist to serve that presumption, and the presumption itself is protected by due process. *Taylor v. Kentucky*, 436 U.S. 478, 490 (1978)("[T]he trial court's refusal to give petitioner's requested instruction on the presumption of innocence resulted in a violation of his right to a fair trial as guaranteed by the Due Process Clause of the Fourteenth Amendment"); *In re: Winship*, 397 U.S. 358, 364 (1970)("[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.") Thus even if the Court believed that the prohibition on excessive bail, or

the right to a speedy trial, were not violated in an individual case, the fact that Kentucky systematically ensures that the average accused person will serve hundreds of days in custody prior a trial violates the essentials of due process and fair treatment. U.S. Const. Amend V, VI, XIV; Ky.Const. § 2, 10, 11, 17.

V. THIS COURT SHOULD CLEARLY MANDATE TO THE COURT OF JUSTICE THE APPROPRIATE EVIDENTIARY STANDARD FOR BAIL DECISIONS AND THE APPROPRIATE APPELLATE REVIEW STANDARD FOR BAIL APPEALS.

In *Long v. Hamilton*, 467 S.W.2d 139, 141, 142 (Ky. 1971), Kentucky's then-highest Court held: "Appellate courts will not attempt to substitute their judgment for that of the trial court and will not interfere in the fixing of bail unless the trial court has clearly abused its discretionary power. 8 C.J.S. Bail § 51(1)." This language – which is not required by any constitutional provision – has had the unfortunate effect of inducing appellate courts to decide matters of pretrial release based solely on whether a court has abused its discretion, without addressing whether the lower court employed the correct evidentiary standard, or any evidentiary standard at all.

This is not the appropriate standard of review. In holding that use of the writ of habeas corpus was an appropriate avenue of appeal of an excessive bail case, the U.S. Supreme Court noted the limits to be placed on judicial discretion: "Petitioners' motion to reduce bail did not merely invoke the discretion of the District Court setting bail within a ***zone of reasonableness***, but challenged the bail as violating statutory and constitutional standards. As there is ***no discretion to refuse to reduce excessive bail,*** the order denying the motion to reduce bail is appealable as a 'final decision' of the District Court." *Stack v. Boyle,* 342 U.S. 1, 72 S.Ct. 1, 96 L.Ed. 3 (1951), [Emphasis added.] Nevertheless, prior

Kentucky opinions have treated "discretion" as an alternative to "clear and convincing evidence." (See the language of the *Keen, Haney, Redmon* and *Richardson* unpublished orders referenced in footnote 1, and attached collectively as Exhibit 14.)

This is reminiscent of the old Miller Lite Beer commercials where two people argue over whether the beer "tastes great" or is "less filling," when in fact one is not in opposition to the other. Clear and convincing evidence and abuse of discretion can and do exist in the same hearing. For example, clear and convincing evidence is the evidentiary standard required in cases involving termination of parental rights (*see Vinson v. Sorrell*, 136 S.W.3d 465 (Ky. 2004), and quieting title to land (*see Vick v. Elliot*, 422 S.W.d 277 (Ky. App. 2013).) The "clear and convincing evidence" standard has been defined as follows:

> We conclude that where the "burden of persuasion" requires proof by clear and convincing evidence, the concept relates more than anything else to an attitude or approach to weighing the evidence, rather than to a legal formula that can be precisely defined in words. Like "proof beyond a reasonable doubt," "proof by clear and convincing evidence" is incapable of a definition any more detailed or precise than the words involved. It suffices to say that this approach requires the party with the burden of proof to produce evidence substantially more persuasive than a preponderance of evidence, but not beyond a reasonable doubt. *Vinson v. Sorrell*, 136 S.W.3d 465, 468–69 (Ky. 2004), quoting *Fitch v. Burns*, 782 S.W.2d 618, 622 (Ky. 1989).

Where "clear and convincing evidence" is the standard, an appellate court may set aside a trial court's findings of facts only when those findings are "clearly erroneous." "To determine whether findings are clearly erroneous, reviewing courts must focus on whether those findings are supported by substantial evidence." *Vinson, supra* at 480. In turn, "substantial evidence" is defined as follows:

> "[S]ubstantial evidence" is "[e]vidence that a reasonable mind would accept as adequate to support a conclusion" and evidence that, when "taken alone

> or in the light of all the evidence, ...has sufficient probative value to induce conviction in the minds of reasonable men." Regardless of conflicting evidence, the weight of the evidence, or the fact that the reviewing court would have reached a contrary finding, "due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses" because judging the credibility of witnesses and weighing evidence are tasks within the exclusive province of the trial court. Thus, "[m]ere doubt as to the correctness of [a] finding [will] not justify [its] reversal," and appellate courts should not disturb trial court findings that are supported by substantial evidence. *Vinson*, at 470, *citations omitted.*

Where the burden of persuasion is clear and convincing proof, substantial evidence is that evidence that a rational fact finder could deem equal to that standard. *See Francis v. Gonzales*, 442 F.3d 131 (2nd Cir. 2006)("The substantial evidence test becomes more demanding as the underlying burden of proof increases.") As this Court has previously noted:

> [The] clear error and abuse of discretion are separate standards of review. Clear error applies to a review of a trial court's findings of fact; abuse of discretion applies in other situations where, for example, a "court is empowered to make a decision—of its choosing—that falls within a range of permissible decisions."...
>
> [A]n error that is alleged in the trial court's findings of fact must be reviewed for clear error before the appellate court can reach the discretionary aspects of the trial court's decision. *Miller v. Eldridge*, 146 S.W.3d 909, 915 (Ky. 2004).

Tying all this together, whenever a judge decides by clear and convincing evidence that someone poses a threat to the public or to a specific individual, the underlying facts supporting the court's decision should be subject on appeal to the "clearly erroneous" standard, and the decision to detain without bail (as opposed to imposing conditions or combination of conditions to ensure the safety of the public) should be subject to the abuse of discretion standard.

In short, in addition to ordering trial courts to make a finding of dangerousness by clear and convincing evidence prior to ordering pretrial detention, this Court should also rule that appellate courts should review the fact-finding by such lower courts on a "clearly erroneous" standard, and any decision to detain based thereon by the "abuse of discretion" standard.

VI. THE ISSUES RAISED IN THIS PETITION ARE NOT MOOTED BY THE CONCLUSION OF ANY OF THE PETITIONERS' CASES.

Some, but not all, of the Petitioner's cases have concluded with a guilty plea. However, the issues raised by them are not moot, as the issues at hand are of substantial public importance and therefore falls under the public interest exception to the mootness doctrine. This exception "...allows a court to consider an otherwise moot case when (1) the question presented is of a public nature; (2) there is a need for an authoritative determination for the future guidance of public officers; and (3) there is a likelihood of future recurrence of the question." *Morgan v. Getter*, 441 S.W.3d 94, 102 (Ky. 2014). The instant cases and the myriad cases which are similar meet each of these elements and therefore, this Court should reach and decide the merits of the cases even if this Court finds the completed cases otherwise to be moot.

Pretrial release is undoubtedly a question of a public nature. Who is incarcerated and who is released from jail pending adjudication of their case affects not only the individual defendant, but their families and the community at large. Yet, neither this Court, nor the Kentucky Court of Appeals have addressed the bail changes in KRS 431.525 since it was enacted in 1976 or amended in 2011, or KRS 431.066 which was enacted in 2011. These are new laws and there are no written opinions

regarding them. Guidance is needed from this Court as to how the law is to be applied by the circuit courts throughout the Commonwealth. An opinion in this case would provide that desperately needed, authoritative guidance.

Specific to the issue of mootness, there is a likelihood that the issues raised herein will continue to reoccur. In *Bolton v. Irvin*, 373 S.W.2d 432 (Ky. 2012), where the issue before the Supreme Court was whether a district court could increase the amount of a defendant's bail following a preliminary hearing, this Court addressed the fact that the matter had already been resolved by the fact that the district court had changed the bond which the defendant could make. The Court had this to say:

> Before turning to the merits of this case, we must first address whether the Court of Appeals properly dismissed the case as moot. This Court has previously recognized that "jurisdiction is not necessarily defeated simply because the order attacked has expired, if the underlying dispute between the parties is one 'capable of repetition, yet evading review.'" [citations omitted]. That is to say, a technically moot case may nonetheless be adjudicated on its merits where the nature of the controversy is such that "the challenged action is too short in duration to be fully litigated prior to its cessation or expiration and ... there is a reasonable expectation that the same complaining party would be subject to the same action again." *Philpot v. Patton*, 837 S.W.2d 491, 493 (Ky.1992) (quoting *In re Commerce Oil Co.*, 847 F.2d 291, 293 (6th Cir.1988)).
>
> The time between Irvin's arrest and his indictment (including his first appearance in district court and his preliminary hearing) was of short duration. The timeline in this case is typical of cases throughout the Commonwealth, and a district court order modifying a bail bond in a felony case will almost always be superseded before the issue can be fully litigated.

Here, the issues raised by the Petitioners are such that it is not only likely and capable of repetition, but they are certain to be repeated. The trial courts are faced with pretrial bond decisions on a regular basis. This issue is not unique or specific in nature.

A similarly-situated party will be subject to the same action again, and indeed, this precise factual scenario could be duplicated.

There are similarly situated defendants, both in the present and the future, that need the benefit of a ruling on the issues presented by this Petition. Such a ruling could prevent a defendant from remaining in custody prior to trial. Because a live case or controversy on these facts would likely continue to evade the Court's adjudication in the future, this Court should decide the issue on its merits and issue a written, published opinion.

VII. THIS COURT SHOULD USE ITS AUTHORITY UNDER KY. CONST. § 110(2)(a) TO ISSUE A WRIT TO CONTROL THE COURT OF JUSTICE TO CORRECT THESE ISSUES.

The record in this case establishes that (a) there is a widespread practice of using money bail as a vehicle for preventative detention, (b) that this is often being done without sufficient evidence, in contravention of constitutional standards, and (c) Kentucky's appellate procedures have proved inadequate to address the matter appropriately on a case-by-case basis. The problem, as noted above, is that the court rules governing bail practice are too vague to protect the right to pretrial release. These court rules need to be much more specific if they are to ensure that indigent persons are either given an affordable bail – which in most cases means no money bail – or that they are found to be a danger or flight risk by clear and convincing evidence.

This scenario is exactly what the supervisory writ power in Ky.Const. § 110(2)(a) was meant to address. This Court long ago conceded that under § 110(2)(a) "this Court possesses the raw power to entertain any case which fits generally within the rubric of its

constitutional grant of authority." *Abernathy v. Nicholson*, 899 S.W.2d 85, 88 (Ky. 1995). Consequently, "virtually any matter" related to supervising the Court of Justice falls within this Court's jurisdiction. *Id.* More, recently, in *Commonwealth v. Carman*, 455 S.W.3d 916, 923 (Ky. 2015), this Court reaffirmed the distinction between "revisory" writs (i.e. the typical writ case where the appellate court is evaluating the performance of the lower court in an individual case) and "supervisory" writs, which are "necessary to address an ongoing practice that is not limited to one case or even one judge" where "the broader concern is this Court's control over the proper functioning of our courts...." The *Carman* court concluded that where "a majority of this Court believes the circumstances merit a supervisory writ," then "the usual appellate writ standard applicable to revisory writs is not applicable." *Id.*

Attempting to litigate this issue through the current appellate system is akin to asking the ranger to sound the alarm that the forest is on fire, while only letting her look at one tree at a time. That kind of problem is why the supervisory writ power was granted to this Court, and why it should be used in this case. Accordingly, Petitioners ask this Court to grant this Petition for a supervisory writ, as described below.

Conclusion

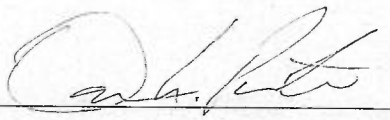
For the foregoing reasons, this Court should grant a supervisory writ that ensures the following:

1. Money bail of any kind is not to be imposed upon an indigent defendant, or upon any defendant in an amount beyond the defendant's immediate financial

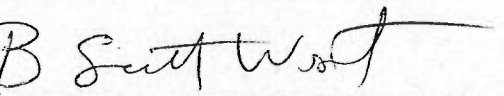
capacity, unless the court has taken evidence and found that clear and convincing evidence exists to believe that the defendant is a flight risk or likely to commit another offense while awaiting trial. In making this decision, the mere fact of the defendant's charges shall not be considered.

2. In any case where an appeal or habeas corpus action is taken to challenge lower court's pretrial release decision, the appellate court should find that a trial court abuses its discretion when it imposes a financial condition of release that is unmanageable by the individual before the Court, in the absence of substantial evidence indicating a flight risk or likelihood to commit a new offense, or in the absence of a specific finding by clear and convincing evidence.

Respectfully Submitted,



Damon L. Preston, Public Advocate



B. Scott West, Deputy Public Advocate

Timothy G. Arnold, Post-Trial Division Director

Department of Public Advocacy
5 Mill Creek Park
Frankfort, KY 40601
502.564.8006
502.695.6769 (fax)

NOTICE

Please take notice that the foregoing motion was filed in the Kentucky Supreme Court on January 17, 2020.

CERTIFICATE OF SERVICE

I hereby certify that on January 17, 2020, the foregoing Writ was served by first class mail, postage prepaid, upon the following:

- Daniel Cameron, Attorney General, Commonwealth of Kentucky, 1024 Capital Center Drive, Frankfort, KY 40601.
- Derrick Ammons, 134 Main Street, #3A, Brandenburg, KY 40108.
- Desmond Bellomy, incarcerated in Jessamine County Detention Center.
- Robert Collier, incarcerated in Mason County Detention Center.
- Brittany Houchin-Decker, 19113 Louisville Road, Smith Grove, KY 42171.
- Robert Decker, 236 Hadden Mill Road, Elkton, KY 42220.
- Stanley Keith, 4145 S. Preston Hwy, Shepherdsville, KY 40165.
- James Kleinhelter, incarcerated in Bullitt County Detention Center.
- Virgil Preston, 102 Hill N Dale Drive, Nicholasville, KY 40356.
- Robert Wesley Stephens, incarcerated in Pulaski County Detention Center.
- Brandon Wright, incarcerated in Bullitt County Detention Center.
- Hon. Janet C. Booth, 13th Judicial District, Jessamine District Court: Jessamine County Court Complex, 107 N. Main Street, Nicholasville, KY 40356.

- Hon. Timothy R. Coleman, 38th Judicial Circuit, Edmonson Circuit Court: P.O. Box 169, Washington Street, Hartford, KY 42347.
- Hon. Steven R. Crebessa, 46th Judicial District, Meade District Court: Meade County Courthouse, 516 Hillcrest Drive, Suite 6, Brandenburg, KY 40108.
- Hon. Hunter Daugherty, 13th Judicial District, Jessamine Circuit Court: 101 N. Main Street, Nicholasville, KY 40356.
- Hon. Joe W. Hendricks, Jr., 7th Judicial Circuit, Todd Circuit Court: Logan County Court of Justice, 329 W. 4th Street, P.O. Box 68, Russellville, KY 42276.
- Hon. Jennifer Porter, 55th Judicial District, Bullitt District Court: P.O. Box 586, Shepherdsville, KY 40165-0586.
- Hon. Kim Razor, 19th Judicial District, Mason District Court: Fleming County Judicial Center, 101 North Main Cross Street, Flemingsburg, KY 41041.
- Hon. Kathryn G. Slone, 28th Judicial District, Pulaski District Court: P.O. Box 682, Somerset, KY 42502.
- Courtesy Copies sent to Commonwealth's and County Attorneys in each of the Judicial Circuits.

B. Scott West, Deputy Public Advocate

EXHIBIT LIST

1. Derrick Ammons, Meade District Court, 19-M-00365
2. Desmond Bellomy, Jessamine Circuit Court, 19-CR-00273
3. Robert Collier, Mason District Court, 19-F-00257
4. Robert Decker, Todd Circuit Court, 18-CR-00012
5. Brittney Houchin-Decker, Edmonson Circuit Court, 19-CR-00118
6. Stanley Keith, Bullitt District Court, 19-T-05030
7. James Kleinhelter, Bullitt District Court, 19-F-00884
8. Virgil Preston, Jessamine District Court, 18-F-00419
9. Robert Wesley Stephens, Pulaski District Court, 19-F-00610
10. Brandon Wright, Bullitt District Court, 19-F-00921
11. Supreme Court Order 17-01 and Amendments
12. Supreme Court Order 17-20
13. Collective List of Non-Published Orders

    Williams v. Commonwealth, 2019-CA-001767
    Terhune v. Commonwealth, 2018-CA-001358
    Richardson v. Commonwealth, 2017-CA-000299
    Oney v. Commonwealth, 2015-CA-000748
    Conrad v. Commonwealth, 2015-CA-001178
    Redmon v. Commonwealth, 2011-CA-001428
    Haney v. Commonwealth, 2011-CA-001427
    Keen v. Commonwealth, 2011-CA-001323
    Medina-Santiago v. Commonwealth, 2011-CA-001420
14. Collective List of Motion for Discretionary Review Denials

    Terhune v. Commonwealth, 2018-SC-000589
    Richardson v. Commonwealth, 2017-SC-000338
    Oney v. Commonwealth, 2015-SC-000464
    Conrad v. Commonwealth, 2015-SC-000708
    Napier v. Commonwealth, 2012-SC-000230
    Medina-Santiago v. Commonwealth, 2011-SC-000776
15. Kentucky Judicial Conduct Commission's Agreed Order of Suspension of a District Court Judge in the 34th Judicial District.
16. Justice Policy Institute publication "Bail Fail: Why the U.S. Should End the Practice of Using Money for Bail"

EXHIBIT LIST (cont.)

17. "Disparate Justice: Where Kentuckians Live Determines Whether They Stay in Jail Because They Can't Afford Cash Bail," Spalding, A., Kentucky Center for Economic Policy, June 11, 2019
18. "Release Decisions and Outcomes Cases Booked CY 2014-2018 Statewide," Sturtevant, D., and Manley, T., Kentucky Administrative Office of the Courts, February 21, 2019.
19. Affidavit of Timothy Arnold and Attachment